SUPREME COURT, U.S.
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No. 93-1191

In The

Supreme Court of the United States

October Term, 1993

JEFFREY JAY EZZELL,

Petitioner,

v.

NEW HAMPSHIRE INSURANCE COMPANY,
a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sixth Circuit Court of Appeals correctly applied the standard for summary judgment in affirming declaratory judgment granted by the district court, and the petitioner has failed to present any basis for granting the Writ of Certiorari.

PARTIES TO THE PROCEEDING

PETITIONER

Jeffrey Jay Ezzell (Appellant-Defendant)

OTHER APPELLANTS-DEFENDANTS WHO ARE NOT PETITIONERS OR RESPONDENTS

A. Luurtsema Truck Lines, Inc., a Michigan Corporation, Michigan Mutual Insurance Company, a Michigan Corporation, and George Wilder

RESPONDENT

New Hampshire Insurance Company, a Foreign Corporation, which is a subsidiary of AIG Group, Inc.

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STATEMENT OF JURISDICTION

A writ of certiorari may be granted in any case after judgment is entered, 28 U.S.C. §1254. Review, however, is discretionary, and the writ must be brought within 90 days after entry of the judgment, Sup. Ct. R. 13.1. A suggestion made to the U.S. court of appeals for rehearing en banc does not extend the time for filing, Sup. Ct. R. 13.4. The Judgment of the Sixth Circuit was entered September 7, 1993, but the Petition for Writ of Certiorari was not filed until January 19, 1994. Since this was more than 90 days after entry of the Judgment from which

review is requested, the Court is without jurisdiction to grant this petition.

STATEMENT OF THE CASE

The statement provided by the petitioner appears to be generally correct, and although some of the dates are inaccurate, the errors are not substantive.

REASONS FOR DENYING THE PETITION

The decision of the Sixth Circuit is adequately supported by the record, and rests upon well-developed principals of state law. The petitioner has failed to present any special or important reasons for granting the petition, nor any other basis recognized by this Court, and as a result, the petition should be denied.

I. FACTUAL SUMMARY

A. Luurtsema Truck Lines, Inc. (ALTL) is a long-haul trucking company located in Hudsonville, Michigan. The company was insured by Michigan Mutual Insurance Company (MMIC) through 1985, but due to a dramatic rate increase, and subsequent cancellation by the insurer, ALTL had to look elsewhere for insurance. It obtained coverage, eventually, from the Michigan Automobile Placement Facility, or assigned risk pool, and was issued a truckers policy again, by MMIC, the contractual agent of the assigned risk pool. John Stamm (Stamm), the

risk manager for ALTL, believed that this policy only provided coverage for long-haul tractor trailers, so he obtained a separate business auto policy from the New Hampshire Insurance Company (NHIC), for private passenger autos and pick-up trucks owned by the company, and used about the premises in Hudsonville. Coverage was indicated on the declarations page of this policy by numbers, which referred to a broader description of the coverage found elsewhere in the policy. Liability coverage should have been identified by the number "7", which would indicate that the policy only provided coverage for vehicles specifically identified on the schedule within the policy, but instead, the policy was issued with the number "2", which indicated coverage for any owned auto.

The mistake went undetected for several years, until the petitioner, Jeffrey J. Ezzell (Ezzell), was injured while riding as a passenger in an ALTL tractor. He filed a lawsuit against the company for his injuries, and Stamm placed MMIC, but not NHIC, on notice. The suit was defended by MMIC for six (6) months when the NHIC policy was discovered by Ezzell. The ALTL agent which had placed the policy put NHIC on notice, but did not ask for a defense to the suit, since it had been his intent, and that of the contracting parties, that only the domestic cars and pick-up trucks would be insured under that policy. After conducting an investigation into the claim, NHIC filed a complaint for declaratory judgment, asking the Court to reform the policy to reflect the coverage intended by the parties. Extensive discovery was taken. Virtually all witnesses involved in preparation of the policy, as well as all documentary evidence, confirmed

the fact that it was the intent of the parties to insure only the domestic autos and pick-up trucks specifically scheduled in the policy. NHIC and the Defendants both filed separate motions for summary judgment, and after a hearing on the motions, the district court granted judgment in favor of NHIC. An appeal was taken by the Defendants, and the judgment of the district court was affirmed in a decision issued by the Sixth Circuit Court of Appeals.

II. THE SUMMARY JUDGMENT STANDARD WAS CORRECTLY APPLIED

The authority of the district court to grant summary judgment is not disputed:

> "The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

Summary judgment was granted by the district court and affirmed by the Sixth Circuit Court of Appeals. The appellate court considered the Stamm affidavit submitted by the petitioner in support of his own motion for summary judgment, which, in relevant part, contradicted the witness's earlier deposition testimony, but found that the affidavit did not create a material issue of fact. The court, in reaching its decision, specifically recognized that the affidavit provided evidence of a contrary intent by the policyholder, but even if true, was insufficient, as a matter of law, to raise any genuine issue of material fact

regarding the intent of the parties to the contract. *Jones v General Motors Corp.*, 939 F.2d 380, 384-85 (6th Cir. 1991). Where the "evidence . . . is so one-sided that a party must prevail as a matter of law," *Side Street v J.C. Bradford and Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989), the court determined that summary judgment is appropriate. Summary judgment should be granted whenever the requirements of the rule are satisfied:

> "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v Catrett*, 477 U.S. 317, 323-24 (1986).

See also, *Matsushita Electric Co. v Zenith Radio Co.*, 475 U.S. 574 (1986); and *Side Street v Bradford, supra.* It is properly granted to an insurer where there is no question of material fact, and no reasonable interpretation of the policy that would allow coverage of the claim, *Continental Graphic Services, Inc. v Continental Cas. Co.*, 681 F.2d 743 (11th Cir. 1982). In reviewing a decision granting summary judgment, the court of appeals must apply the same legal standards as those which control the district court, *American Viking Contractors, Inc. v Scribner Equipment Co.*, 745 F.2d 1365 (11th Cir. 1984).

The Sixth Circuit applied the summary judgment standard consistent with the prior decisions of this Court. While the petitioner argues that the decision reached by the Sixth Circuit is in conflict with the prior decisions on which it relied (Petition, at 5), he is unable to provide any factual support for his argument.

III. THERE IS NO REASON FOR GRANTING THE PETITION

There is no dispute that the appellate court accurately identified the basic dispute between the parties, giving consideration to both the evidence advanced by NHIC and the affirmative defenses offered by the petitioner (Petition, at 7). This Court is urged to grant the petition because "there was a significant misapprehension of fact . . . which was exacerbated by an inappropriate application of the so-called "new era" doctrine of summary judgment (Petition, at 7). It is not entirely clear what this means, but it does not appear to be a basis on which this Court may grant a petition for writ of certiorari.

The petitioner seems to argue that either the lower court did not give enough consideration to the Stamm affidavit (Petition, at 8-10), or it improperly determined on summary judgment that Stamm was not credible (Petition, at 12). There is little doubt that the Sixth Circuit considered the Stamm affidavit, but it indicated that the mere discrepancy the affidavit raised was "insufficient to take an issue to the trier of fact." (Petition, App. 8). It did not disregard the affidavit as a matter of law, contrary to the position urged by the petitioner (Petition, at 9), even though it was entitled to do so. Nor did the lower courts improperly weigh the credibility of the witness (Petition, at 12). The petitioner has not offered any support for these arguments, but even if they were true, they would not constitute a basis on which to grant a petition for writ of certiorari. While the considerations governing review on a writ of certiorari prescribed by the Court are not

definitive, they set forth a clear basis upon which a petition may be granted.

> "A petition for writ of certiorari will be granted only when there are special important reasons therefore." Sup. Ct. R. 10.

These reasons include:

> (A) When the U.S. court of appeals has issued a decision in conflict with a decision of another U.S. court of appeals on the same matter; or decided a federal question in conflict with the state supreme court or significantly departed from the accepted course of judicial proceedings or sanctions such as departure by the lower Court;
>
> (B) When the State Supreme Court has decided a federal question in a way that conflicts with the decision of another state court of last resort or a U.S. court of appeals; or
>
> (C) When a state court or U.S. court of appeals has decided an important question of federal law which has not been, but should be settled by this Court or decided a federal question in a way that conflicts with prior decision of this Court. Sup. Ct. R. 10, *supra.*

The courts in Michigan have determined that a written instrument may be reformed when it fails to express the intent of the parties. *Najor v Wayne National Life Ins. Co.*, 23 Mich. App. 260, 178 N.W.2d 504 (1970); *see also Biondo v Ridgemont Ins. Agency Inc.*, 104 Mich. App. 209,

304 N.W.2d 534 (1981). There is no conflict among courts on this issue, nor any question presented that should be settled by this Court. The "significant misapprehension of fact" urged by the petitioner, even if true, is not a special or important reason for granting the petition, nor are there any other reasons identified by the rule which the petitioner has brought to the court's attention.

IV. DISCOVERY DID NOT NEED TO BE SUPPLEMENTED

It is argued by the petitioner that summary judgment was "presented" before discovery was completed, implying, perhaps, that the lower courts acted prematurely. Discovery was originally scheduled to expire May 7, 1991, but was extended several times by the Court until December 9, 1991, at the request of Defendants. NHIC filed its Motion for Summary Judgment July 12, 1991, and Defendants continued to conduct discovery for another four (4) months. On December 12, 1991, the petitioner, along with other Defendants filed their motions for summary judgment, which were heard by the district court several weeks later. Judgment was entered in favor of NHIC by the Court on March 24, 1992.

The Stamm deposition was taken April 23, 1991. The petition indicates that this deposition was not completed, and for that reason, the affidavit of this witness was necessary to supplement the deposition testimony. The transcript, however, indicates that Defendants terminated the deposition at the end of direct examination by the attorney for NHIC, and the attorney for Ezzell reserved the right to conduct his cross-examination at a later date

(Appendix 1). Despite the fact that discovery was continued for almost another eight (8) months, none of the Defendants ever rescheduled the deposition. Since direct examination was completed, it was neither the right nor responsibility of NHIC to continue the deposition. The petitioner filed his motion for summary judgment after the final close of discovery, supported by the Stamm affidavit, which in relevant part contradicted his earlier deposition testimony.

Stamm testified that the intent of Luurtsema, in obtaining insurance from NHIC, was to cover the non-commercial vehicles owned by Luurtsema, because he believed that the truckers policy issued by MMIC through the assigned risk pool did not cover these vehicles:

> "Q. Why do they get the other policy from New Hampshire?
>
> A. Because we were told the assigned risk would only cover commercial vehicles.
>
> Q. Ok. So your purpose in getting the New Hampshire policy was to cover non-commercial vehicles?
>
> A. Yes.
>
> Q. That would be vehicles other than trucks?
>
> A. Yes, and any coverages that came along with it." (Deposition of John Stamm, at 53), (Appendix 1).

The Stamm affidavit that was subsequently submitted attempted to establish a different intent:

> "In reliance upon the 1986-87 New Hampshire policy providing $1 million in liability coverage

> for owned autos, in addition to the $750,000 with Michigan Mutual, I took no other action to obtain additional coverage for the long haul vehicles." (Affidavit of John Stamm, ¶10, Defendant's Motion for Summary Judgment, Ex. 3).

The petitioner claims that the affidavit covers areas not covered in the deposition, and does not contradict the prior oral testimony of the witness (Petition, at 8-9, 11). While the affidavit may, in fact, cover other areas as well, it was clearly offered as evidence that Luurtsema intended to cover its tractor-trailers under the NHIC policy. The petitioner can not have it both ways: the affidavit either contradicts the deposition testimony or it does not, but either way it is without any real significance for this petition. If the statements in the affidavit relate to other areas, the petitioner has not shown that they are important, or addressed any material issues of fact. The only statements which the petitioner admits relate to the central issue – the intent of the parties (Petition, at 7) – contradict the deposition testimony. The Petitioner does not dispute that a party may not create a factual issue for purposes of defeating a motion for summary judgment by filing an affidavit contradicting the statements made in a prior deposition, *Jones v General Motors Corp., supra,* (Petition, at 9). The "obvious chaos and mischief" that would be created by a party changing the testimony of a witness without the benefit of cross examination is readily apparent to the petitioner (Petition, *Id.*), yet that is exactly what he has attempted to do.

CONCLUSION

The petitioner failed to file his petition within the time required, but even if he had, there have been no reasons presented for granting the petition. As a result, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 17, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEW HAMPSHIRE INSURANCE COMPANY, a foreign corporation, Plaintiff, -vs- A. LUURTSEMA TRUCK LINES, INC., a Michigan corporation and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, and JEFFREY JAY EZZELL, Defendants. and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, Counter-Plaintiff, -vs- NEW HAMPSHIRE INSURANCE COMPANY, a foreign corporation, Counter-Defendant.	Case No. 1:90-CV-747

The deposition of JOHN STAMM taken under the provisions of the Michigan General Court Rules before Terri Sparkman. (CSR-2704), Certified Shorthand Reporter and Notary Public, at 200 Calder Plaza Building,

Grand Rapids, Michigan, on April 23, 1991, commencing at 9:30 a.m., pursuant to Notice.

O'BRIEN & BAILS

Certified Shorthand Reporters

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[p. 53] * * *

A I am not sure. I am going on what people told me as far as what they would cover and what they wouldn't and what they wanted on their policies.

Q Where did you hear that?

A I am not sure which agent told me.

Q What vehicles did the Michigan Mutual policy cover?

A All owned vehicles for liability purposes.

Q Going back to my question, since insurance was more expensive for this policy period, do you know why Luurtsema would have bought yet another policy covering the same risk, or was it meant to cover a different risk?

A We needed two policies because of the placement facility covering commercial vehicles, as I understand it.

Q You just told me that this covered all vehicles, including non-commercial vehicles.

A That is the way the policies were issued, yes.

Q Why did they get the other policy from New Hampshire?

A Because we were told the assigned risk would only cover commercial vehicles.

Q Okay. So your purpose in getting the New Hampshire policy was to cover non-commercial vehicles?

A Yes.

Q That would be vehicles other than trucks?

A Yes, and any coverages that came along with it.

* * *

[p. 125] Q You didn't form any opinion about that?

A I don't think I did.

MR. SELINSKY: I don't have any other questions at this time.

(Brief recess.)

MR. CAMPOS: Mr. Stamm has been here for about five, five and a half hours now. Mr. Stamm has other matters to attend to. I would ask if counsel are agreeable that Mr. Stamm be allowed to leave.

MR. HEBEISEN: I have no objection, and in light of the fact we have another deposition scheduled and you have somebody on the way, I could be up to an hour in my questioning with him.

MR. CAMPOS: I understand Mr. Bandeen may well be the same.

MR. BANDEEN: I have no objection, primarily because I am starving.

MR. CAMPOS: Then we are over.

MR. HEBEISEN: The other thing, I would ask is that all the exhibits that were marked and used at this deposition, or copies thereof, be attached to the transcript.

MR. SELINSKY: Yes, if you can copy them.

MR. CAMPOS: I have no objection.

MR. HEBEISEN: I on behalf of Mr. Ezzell am [p. 126] reserving my right to resume or begin and finish my cross examination of Mr. Stamm at a date agreeable to all sides in the future, because of the scheduling problems inherent with what we are doing today.

MR. BANDEEN: I would also make the same reservation as Mr. Hebeisen on behalf of Michigan Mutual.

MR. CAMPOS: No objection.

(Deposition adjourned)